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Senior Court Reporter
Court - New York County - Civil Division
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January 10, 2011

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Bill for stenographic services in the matter of:
U.S. BANK VS. GREENPOINT MORTGAGE

Index No. 600352/09

Before: BERNARD J. FRIED, SCJ

Date: January 6, 2011

Order Description:

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : CIVIL DIV. : PART 60

-----X
U.S. BANK NATIONAL ASSOCIATION, as :
Indenture Trustee for the Benefit of the :
Insurers and Noteholders of GreenPoint :
Mortgage Funding Trust 2006-HE1, Home :
Equity Loan Asset-Backed Notes, Series :
2006-HE1; SYNCORA GUARANTEE INC., :
formerly known as XL CAPITAL ASSURANCE :
INC., as Controlling Insurer, Note :
Controlling Party and Class Ax Insurer; :
and CIFG ASSURANCE NORTH AMERICA, INC., :
as Class Ac Insurer, :
:
Plaintiffs, :
:
- against - : Index No.
: 600352/09
GREENPOINT MORTGAGE FUNDING, INC., :
:
Defendant. :
-----X MOTION

60 Centre Street
New York, New York
January 6, 2011

B E F O R E :

HON. BERNARD J. FRIED,
Justice

(Appearances on the following page.)

ROBERT PORTAS, R.P.R., C.R.R.
SENIOR COURT REPORTER

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25 BY: MICHAEL T. CONWAY, ESQ.

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1 THE COURT: Good morning, folks. Be seated.

2 Before we get into the merits, which I don't
3 think we're going to get into today -- and I'll explain
4 why I think we're not going to get into it. I have had
5 some fundamental concerns with what I call the procedural
6 issues in this case. And I can hear from you at length,
7 I don't think it's necessary, because I've finally
8 figured it out, what I think I should do here, and I'm
9 going to talk about that, and then I'll give you a chance
10 to respond. The -- I'm going to say it in no particular
11 order, then I think I know what I want to say in an
12 orderly fashion, but let me start in my disorderly
13 fashion:

14 There are three parties, one, two and three.
15 Parties 2 and 3 were dismissed, that's CIFG and Syncora.
16 There is an amended complaint that was filed within the
17 time period as of right, adding those parties back with
18 regard to the indemnification, but not the other
19 contracts. There's an opposition to that on the ground
20 that it violates 3025(e), that it should have been done
21 by leave and not by -- as a matter of right.

22 The -- there is -- and as to that motion -- I'm
23 sorry, as to that amended complaint there was no
24 evidentiary support submitted, at least it was never
25 discussed, because it was a direct procedural argument.

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1 With regard to -- then what comes in sequence is
2 the cross motion to -- not to -- cross motion for leave
3 to file a proposed second amended complaint, which takes
4 the allegations from the first amended complaint,
5 incorporates them in its entirety and adds two causes of
6 action. As to those two causes of action, there has been
7 added or submitted an evidentiary support which is
8 required on motion for leave to amend.

9 And if I'm talking with my hand over my mouth,
10 I'm sorry if you can't hear.

11 There is now opposition to the second --
12 proposed second amended complaint on the sufficiency
13 based on the evidentiary submissions in opposition to the
14 original complaint on grounds of res judicata, and
15 there's opposition to everything on grounds of
16 substantive sufficiency.

17 It seems to me that what I should do is start
18 this whole process anew. And it seems to me what I
19 should do is to dismiss the--and I'm going to give you my
20 reason why I would do that after I hear from you--the
21 amended complaint without prejudice; I should deny
22 without prejudice the motion for leave to file the
23 proposed second amended complaint; I should grant leave
24 to file, at least to make a motion for leave to file a
25 third proposed amended complaint, which includes

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1 everything that's at play here, so I'm not moving on a
2 checkerboard different pieces, trying to figure out what
3 applies to what.

4 That can be filed relatively quickly, I think.
5 The evidentiary support can be provided, the affidavits
6 that are required on leave to amend could be then
7 submitted, which will cover everything. I can give you a
8 briefing schedule which gives the opposition an
9 opportunity to respond on a fair -- sufficient basis, and
10 then I can take reply papers and set this down for a very
11 quick argument.

12 Everybody's prepared. I've been through a lot
13 of these papers, I don't think it's going to take a lot
14 of time, but I think it's the most efficient and rational
15 thing to do.

16 And I can give you my reasons if anybody has any
17 serious opposition to what I'm proposing. I can also
18 take a short recess and you can talk about it among
19 yourselves. Whatever you think is best.

20 Mr. Forlenza...?

21 MR. FORLENZA: I just have a quick question. Do I
22 understand your Honor to say that when the insurers make
23 their motion for leave to file a third amended complaint
24 we're going to have to have evidentiary support for all the
25 claims, including in the first amended complaint which in

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1 effect your Honor seems to be ruling that we really did
2 need leave, even though --

3 THE COURT: That's exactly what I'm saying.

4 MR. FORLENZA: Even though -- so --

5 THE COURT: That's exactly what I'm prepared to
6 say.

7 MR. FORLENZA: Okay. So I would only suggest or
8 ask that this morning I be allowed, or we be allowed,
9 maybe, to address that issue. Which is to say --

10 THE COURT: The evidentiary support issue?

11 MR. FORLENZA: Yes. In the sense that we believe,
12 as we said in our papers, and it's clear, your Honor, as
13 you always do, has read them, that under CPLR 1003, because
14 we did file timely and 3025 does not cover the situation --

15 THE COURT: 1003, I'm prepared to deal with that.
16 Sure. I can hear from you on that. We'll spend a minute
17 on that if you'd like.

18 MR. FORLENZA: That would be great.

19 THE COURT: Anything else?

20 MR. FORLENZA: Other than that, I must tell you I
21 think this makes sense. Because, for example, a big issue
22 they raise is whether we have pled with sufficiency a
23 causation. And we think we have, but in an amended
24 complaint we can -- we can make sure it's clear, that is to
25 say you don't have to draw inferences that we've alleged X

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1 and Y.

2 So, you know, it's as if now seeing each other's
3 papers we can try to avoid putting lots of issues before
4 your Honor if we can avoid them. That's -- the only
5 issue I have is the evidentiary.

6 THE COURT: Okay.

7 MR. MURPHY: James Murphy, your Honor.

8 THE COURT: I'm sorry, Ms. Boland on behalf of the
9 bank, you really don't have much to say, I suppose.

10 MS. BOLAND: I don't today, your Honor. And I
11 think Mr. Forlenza stated the argument succinctly.

12 THE COURT: The other side of the table.

13 MS. BOLAND: Thank you, your Honor.

14 THE COURT: You're welcome.

15 Mr. Murphy...?

16 MR. MURPHY: Your Honor, we believe that what the
17 Court has proposed makes very good sense. And, in
18 particular, the way this briefing worked, we only actually
19 had one shot, one brief with respect to the second amended
20 complaint.

21 THE COURT: Now you get two bites at the apple.

22 (Laughter.)

23 THE COURT: Because the curtain's up on all the
24 parties' positions.

25 MR. MURPHY: So that's solved.

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1 Also what you see in the final reply brief is we
2 raised this issue about indispensable parties on
3 reformation, and what you see in a reply brief is an
4 offer to bring in Lehman as a party.

9 MR. MURPHY: And the only reason I bring it up,
10 your Honor, is to say that there shouldn't be a fourth
11 amended complaint. We shouldn't have briefing on a third
12 amended complaint that ends with, "But, of course, we could
13 amend again to solve these problems."

14 THE COURT: I guess I'll deal with that when I get
15 to it.

16 MR. MURPHY: Thank you, your Honor.

17 THE COURT: Mr. Conway, do you have anything you
18 want to add?

19 MR. CONWAY: No, your Honor.

20 THE COURT: So you want to discuss the joinder
21 issues as to why the second --

22 MR. FORLENZA: First.

23 THE COURT: The first amended complaint --

24 MR. FORLENZA: Was as of right?

25 THE COURT: -- was filed as a matter of right.

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1 MR. FORLENZA: Yes.

2 THE COURT: And that really deals with the issue
3 of the 205--- 2005 amendment to CPLR 3025(e) and whether
4 that changes anything, and, incidentally, does the fact
5 that you're adding -- you're bringing parties back in take
6 it outside of the purview of 3025. That's it; right?

7 MR. FORLENZA: Pretty much.

8 THE COURT: Okay.

9 MR. FORLENZA: But we would like a break first.

10 THE COURT: You'd like a what?

11 MR. FORLENZA: We would like to have a break first
12 to discuss this and any other reaction with our client to
13 your Honor's position.

14 THE COURT: Yes. Let me just give you the
15 following tentative schedule: I would say that -- that if
16 I do this--and I'm really inclined to do this unless
17 there's some reason -- principle, reason, and I haven't
18 heard one, to not do it, is to take the motion for leave to
19 file what I would call the proposed third amended complaint
20 by February 7th. That gives you about a month. I don't
21 think you need more than that to do it. If you want more
22 time you can figure that out.

23 MR. FORLENZA: That's fine, your Honor.

24 THE COURT: I would give the defendants the same
25 30 days to oppose it. These briefs were already basically
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1 written, they may have to be reorganized. I would take the
2 reply memorandum on the -- on March 21st and I would give
3 you two hours for oral argument on April 4th, from
4 10:00 to 12:00.

5 That's the schedule I propose. Of course if the
6 parties among yourselves want to extend those dates, I'm
7 perfectly happy to, as Scarlet O'Hara said, "Think about
8 it tomorrow."

9 So you want a short recess?

10 MR. FORLENZA: Please.

11 THE COURT: Sure.

12 MR. FORLENZA: Thanks, sir.

13 (Short recess taken.)

14 THE COURT: Be seated, please.

15 Yes, sir?

16 MR. FORLENZA: Your Honor, before I begin, I'd
17 like to ask the Court, I think you mentioned an amendment
18 to 3211 -- 3025(e), and I wondered if you were referring to
19 the amendment to 3211(e).

20 THE COURT: That's what I'm referring to.

21 MR. FORLENZA: Yes, sir.

22 THE COURT: Where they struck out the last line,
23 and it's been the subject of energized debate in the Second
24 Department, resulting in a decision of Janssen where the
25 Second Department concluded that that amendment did not

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1 eliminate the requirement of a motion for leave to replead.
2 That's what I'm referring to.

3 MR. FORLENZA: I'm going to ask Mr. Pippert to
4 argue, since he's researched this.

5 THE COURT: Sure.

6 Yes, sir...?

7 MR. PIPPERT: Yes, your Honor.

8 MR. FORLENZA: Excuse me, we have to hand this up
9 to the Court (handing).

10 THE COURT: Yes, sir...?

11 MR. PIPPERT: Your Honor, in our briefs we
12 explained why the Janssen case is not applicable to -- to
13 what we did and why whatever we say about 3211(e) was -- is
14 not going to be applicable to our facts.

15 Just to briefly review Janssen, the plaintiff
16 filed a complaint, there was a motion to dismiss. The
17 motion to dismiss was granted as to some causes of
18 action, not as to others. Time passed. The 20 days that
19 would allow that plaintiff to move as of right under
20 3025(a) had expired. It was about one year later that
21 the plaintiff made a motion to amend its complaint.

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1 evidence, because that is a trial motion, not a pretrial
2 motion."

3 And so then the Second Department, as your Honor
4 said, went in to what needs to be done, what should this
5 plaintiff have done. He could not move under 3025(a)
6 because he was -- he was out of time; he could not move
7 under 3025(c) to conform to the evidence, because you
8 can't make a motion like that at the pretrial stage, only
9 at the trial stage. So what was left? And it was
10 3025(b). And the Court said that even though the last
11 sentence was taken out of 3211(e), that didn't mean that
12 a plaintiff who wanted to replead the same causes of
13 action, try to cure the deficiencies in the dismissed
14 cause of action, didn't have to proceed under 3025(b).

15 That is the Janssen case, your Honor. It's
16 inapplicable to our situation for a variety reasons.
17 Number one --

18 THE COURT: What's happened here, if I understand
19 it correctly, is I dismissed two parties outright --

20 MR. PIPPERT: Correct.

21 THE COURT: -- and those two parties are seeking
22 to come back into this case.

23 MR. PIPPERT: Correct.

24 THE COURT: Why is it not correct that -- it's
25 analogous to what happened in Janssen that you should be
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1 required -- if you could just come back in without
2 complying with the standard motion to amend, which would
3 require an entry of submission, it makes the dismissal
4 almost of no consequence. So it's an end run around the
5 dismissal, isn't it?

6 MR. PIPPERT: It is not an end run around --

7 THE COURT: I don't mean that negatively, but --

8 MR. PIPPERT: No, I understand. Your Honor is
9 saying the effect of it is an end run. It is not. What we
10 see when 3211(e), the last sentence was eliminated, there
11 was a determination, I don't know whether the amendment was
12 by the legislature or by the Court of Appeals, but it was a
13 determination either by the legislature or by the Court of
14 Appeals not to impose that requirement on a dismissed
15 party.

16 THE COURT: That's the Rivello case.

17 MR. PIPPERT: Yes. And if this Court -- if -- if
18 the plaintiff in Janssen had moved quickly, if it had
19 amended its complaint under 3025(a) within the 20-day
20 window that it had, it would not have been facing the
21 obstacle it faced when it tried to search around for some
22 motion to move under -- and made a 3025(c) motion.

23 THE COURT: Is the only significance of that in
24 this case is that -- if you're correct and I do what I
25 think I want to do and then start this all from scratch, in
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1 effect, is the only significance of that then you don't
2 have to submit evidentiary -- an affidavit of merit with
3 regard to the -- to the pleading that was the first amended
4 complaint? That's the only significance, right?

5 MR. PIPPERT: That would be at least one
6 consequential --

7 THE COURT: What other consequence is there?

8 MR. PIPPERT: It's the only consequence I can
9 think of right now, your Honor.

10 And if the Court were looking for -- you're
11 talking about an end run, an end run might be a fair
12 description of what the Janssen plaintiff was doing,
13 which had causes of action dismissed, there were pleading
14 deficiencies and the Janssen plaintiff says he can cure
15 the cause of action that was dismissed, "I can cure the
16 deficiencies."

17 What we have done here, the first amended
18 complaint does not revisit the causes of action that your
19 Honor dismissed.

20 THE COURT: Because it's -- it's the
21 indemnification causes of action.

22 MR. PIPPERT: That's correct.

23 THE COURT: But it's the same party in those
24 causes of action -- those causes of action could have been
25 filed. They weren't, for whatever reason, in the original
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1 complaint.

2 MR. PIPPERT: They could have been, your Honor.

3 Section 1003, though, the amendment in 1996
4 concurs with the deletion of the language in 3211(e), for
5 the first time allowed without court permission parties
6 to be added. The language of Section 1003 does not say
7 "People who have never been parties," it says "Parties
8 may be added." No court has ever said that 1003
9 implicitly excludes parties that were dismissed on prior
10 occasion. It says without permission of the Court, if
11 you move within the 20-day window that's there, you can
12 proceed.

13 And 3025, and the reason why we have focused on
14 1003, the commentary of -- formally by Professor Siegel
15 and now by Professor Connors says 3025 is for existing
16 parties to either amend as of right their claims or -- or
17 add their claims.

18 THE COURT: Nobody deals with that I've seen.
19 Nobody's submitted them to me with the word "Existing
20 parties, the present party." Nobody deals with a situation
21 where you dismissed a party in a case that I know of and
22 then that party seeks to come back into the same case and
23 says he can do so as a matter of right. You don't cite any
24 case to that effect.

25 MR. PIPPERT: No. And your Honor's correct
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1 neither of us has cited a case.

2 If Janssen had proceeded under 3025(a) to come
3 in in the window of 20 days and file his amended
4 complaint, and if the Second Department had said, "No, we
5 dismiss that cause of action, you can only proceed as of
6 right," then the Janssen reasoning might have some impact
7 on what we've done. But there's no case that deals with
8 this window. There's no judicial law that has said
9 dismissed parties must always proceed when dismissed
10 parties have been required to make a merit showing it has
11 been pursuant to some statutory rule that requires it.

12 And on its face, your Honor, Section 1003 says
13 you may add parties; it doesn't say "Unless they were
14 previously dismissed."

15 THE COURT: I think I understand the issue,
16 Mr. Pippert.

17 Who wants to respond? Mr. Murphy?

18 MR. MURPHY: Thank you, your Honor.

19 There actually is a case that says exactly that,
20 that you cannot use Section 1003 to add back in a
21 previously dismissed party.

22 THE COURT: Do you cite that case?

23 MR. MURPHY: And that's a First Department case.

24 THE COURT: Was that cited in the papers?

25 MR. MURPHY: Yes, your Honor.

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1 THE COURT: What's the name of the case?

2 MR. MURPHY: Hitzig versus Borough --

3 THE COURT: Say that again, please.

4 MR. MURPHY: Hitzig, H-I-T-Z-I-G, versus Borough
5 Telephone Service. It's a First Department case,
6 562 New York Sup. 2d 519, and it is dated 1990. And in
7 this case the defendant --

8 THE COURT: But that's before the amendment.

9 MR. MURPHY: Before the amendment, that's correct.
10 And we believe that Janssen says that the result is
11 unchanged from this -- from this prior decision.

12 THE COURT: Before we get into that, is there any
13 case that you're aware of that following the amendment one
14 way or the other deals with the seeking to add a party?

15 MR. MURPHY: Following --

16 THE COURT: I don't know of any.

17 MR. MURPHY: I don't -- I don't know of anything
18 other than this First Department case that says 1003 does
19 not apply to re-adding -- adding back in a dismissed party.

20 And let's remember, the insurers did not move to
21 amend the complaint here, your Honor. U.S. Bank moved to
22 amend to add their friends the insurers, to bring in
23 completely different causes of action without asking the
24 Court permission to do that. And it's -- and that is
25 impermissible.

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1 And with respect to the comments on
2 Section 1003, it said the purpose of the amendment, your
3 Honor, the 1996 amendment, was to reduce the need for
4 motion practice and harmonize the rule on adding new
5 parties. The comment itself says that it is restricted
6 to new parties. Clearly that means it doesn't apply to
7 previously dismissed parties.

8 THE COURT: Anything else?

9 MR. MURPHY: That's it, your Honor. Thank you.

10 MR. PIPPERT: Your Honor, may I say one word about
11 Hitzig?

12 THE COURT: Sure.

13 MR. PIPPERT: Even though it --

14 THE COURT: It's the First Department case you're
15 referring to?

16 MR. PIPPERT: Yes. H-I-T-Z-I-G, the Hitzig case
17 that Mr. Murphy just cited, your Honor.

25 The First Department says there's a direct
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1 conflict here between two sections of the CPLR. "CPLR
2 2221 required you to make a motion within 30 days to
3 reargue if you wanted to bring this defendant back into
4 the case after he had got gotten summary judgment. 1003
5 is in conflict with that. We're going to give precedence
6 to CPLR 2221 and the 30-day limit that's in that rule."

7 In our situation, your Honor, 1003 is not in
8 conflict with any of the statutory sections.

9 THE COURT: I'm assuming, Mr. Pippert, that you do
10 take the position that if I require -- the evidentiary
11 showing would be required with leave to amend that you can
12 meet that standard with regard to this proposed pleading.

13 MR. PIPPERT: Your Honor, yes.

14 THE COURT: Thank you.

15 Anybody have anything else to say?

16 MR. FORLENZA: I just want to take 30 seconds,
17 Judge, and answer the point that counsel just made. Can
18 I -- about the commentary. Can I hand this up
19 (indicating)?

20 THE COURT: Is this the commentary --

21 MR. FORLENZA: This is by Connors. The practice
22 commentary.

23 THE COURT: Seigel commentary?

24 MR. FORLENZA: Yes (handing).

25 And counsel correctly pointed out that you can
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1 see in the heading it refers to adding a new party. I
2 think you have to read the first sentence to understand
3 the context. It says, "As noted in the practice
4 commentary, in allowing each party to amend its pleading
5 once as of course, CPLR 3025(a) is often the expedient
6 for the interposition of an additional claim against one
7 already a party."

8 So the phrase "New party" simply means it's
9 not -- not a party at the time. It doesn't -- says
10 nothing about a dismissed party.

11 Thank you, Judge.

12 By the way, if your Honor thinks it would be
13 helpful for each of us to put in a two-page --

14 THE COURT: I don't think so. I don't think so.

15 MR. FORLENZA: Thank you.

16 THE COURT: Actually --

17 MR. FORLENZA: Can I raise one final point?

18 THE COURT: Sure.

19 MR. FORLENZA: Back maybe November we'd raised
20 this issue as to whether while the bank -- U.S. Bank and
21 defendant was going through discovery in a limited context
22 that you had ordered whether the insurers could participate
23 and have access to that discovery. We made the argument
24 that -- that there is no reason why we shouldn't since we
25 have confidentiality orders. Counsel took issue with that,

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1 someone, maybe your Honor or I raised a question of a
2 Chinese wall.

3 THE COURT: Didn't I deal with that?

4 MR. FORLENZA: You did not. You said you would
5 promptly and --

6 THE COURT: I didn't issue a --

7 MR. FORLENZA: If you did, I think all the parties
8 missed it.

9 MR. MURPHY: We know of no order on that.

10 THE COURT: I have to look in my computer. I
11 thought I wrote something on that. That's the discussion
12 on October 20th.

13 MR. FORLENZA: Could be. Because it was pre
14 December. And I was only going to add that the -- one
15 idea -- I forget who raised it about a Chinese wall, I'm
16 not -- no longer open to it. I think it would lead to
17 mischief. We stand on our argument that there's sufficient
18 protection in terms of protecting confidential information.

19 MR. MURPHY: And, your Honor --

20 THE COURT: I have a vivid recollection of writing
21 a short form order on that subject. And let me just...

22 Yes, sir?

23 MR. MURPHY: Very quickly, our position is the
24 insurers are not now parties to this case. The Court has
25 permitted them opportunity to seek to re-enter the case,

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1 and, as such, under New York rules they are not entitled to
2 see any of the documents produced in discovery in this
3 case.

4 THE COURT: I'm sure I dealt with that. I'm
5 not -- I'm going to have to go to my other computer.

6 MR. FORLENZA: Okay.

7 THE COURT: And if I did, I'll just refile. If
8 not, I'll get it done quickly. I think I even got the -- I
9 was given the transcript of that proceeding.

10 MR. FORLENZA: You were.

11 MR. CONWAY: Your Honor, we gave you the
12 transcript and we did letter briefs.

13 THE COURT: Well, I hope it's the only mistake I
14 make.

15 (Laughter.)

16 THE COURT: All right. Let me give this back to
17 you. (handing).

18 MR. FORLENZA: Oh, I do want to add one point,
19 your Honor.

20 THE COURT: Yes?

21 MR. FORLENZA: So do I understand that you will
22 take under consideration the argument we've just made?

23 THE COURT: I'm going to resolve everything that's
24 pending here right now.

25 MR. FORLENZA: Okay.

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1 THE COURT: And I'm going to read a short -- I
2 made some notes, and I made some -- in preparation for
3 this, and I think what I need to do is take about a
4 five-minute recess and just make sure, I don't want to miss
5 something. I'll be right back.

6 (Short recess taken.)

7 THE COURT: Remain seated, please.

15 All right, with regard to this proceeding,
16 Defendant Greenpoint Mortgage Funding moves to strike and
17 dismiss claims asserted by Plaintiff Syncora and CIFG in
18 the first amended complaint. Plaintiff Syncora and CIFG
19 oppose this motion and cross move for an order permitting
20 plaintiffs to serve a proposed second amended complaint.

21 By order dated March 3, 2010 I dismissed the
22 original complaint as to Plaintiff Syncora and CIFG.
23 Plaintiff U.S. Bank was not dismissed from the action.

24 On April 14, 2010, the plaintiffs filed an
25 amended complaint which restores to the action the two
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1 parties which had been previously dismissed. Plaintiffs
2 did not seek leave to file the amended complaint.

3 While there is no First Department case on
4 point, it appears to me that the Second Department
5 decision which requires -- requires that a motion for
6 leave to replead be filed following the dismissal under
7 3211. Janssen versus Incorporated Village of Rockville
8 Centre, 59 A.D.3d, at Page 15, that case concluded that
9 the 2005 amendment to the CPLR Section 3211 has not
10 eliminated the requiring for motion for leave to replead.
11 I consider that decision to be binding here.

12 I'm not persuaded by the argument that 3025 does
13 not apply to this amended complaint -- I mean 3211 or
14 3025, and that U.S. Bank can join the already dismissed
15 plaintiffs to this case under the Permissive Joinder
16 Rule, Section 1003. This is not to me a joinder issue
17 since what is being sought is to restore to the action
18 the two parties which have been previously dismissed. To
19 characterize it otherwise would be to permit a --
20 avoidance of 3025(e).

21 It seems unnecessary for me to discuss this
22 further or to write anything on this matter.

23 With regard to the issue of whether or not the
24 plaintiffs have made an evidentiary showing of merit for
25 the entire proposed second amended complaint, that has

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1 not been briefed, rather the only evidentiary showing of
2 alleged merit that has been made is with regard to the
3 two new causes of action added to the second amended
4 complaint. There has been no showing -- evidentiary
5 showing of an alleged merit with regard to the
6 allegations and causes of action pleaded in the amended
7 complaint and now included in the proposed amended second
8 complaint.

9 It seems to me, therefore, that the most
10 efficient and expeditious procedure, as I said earlier
11 this morning, is to dismiss without prejudice the amended
12 complaint, to deny the motion for leave to file the
13 proposed second amended complaint, all the while this
14 action will continue as it has under what remains of the
15 original complaint. Accordingly, the motion may be made
16 to -- for leave to file a proposed amended complaint
17 which is to include the required evidentiary submission.

18 The schedule, the parties may modify if they
19 choose to by stipulation, which will be submitted to me
20 to be so ordered is as follows: The motion is to be
21 served and accompanying papers to be served and filed by
22 February 7th; opposition to the motion for leave and
23 opposition to the merits of the proposed third amended
24 complaint is to be served by -- and filed by March 7th;
25 reply papers by March 21st; and I'm setting aside the

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1 time period from 10:00 o'clock until noon for oral
2 argument on April 4th. That's the next date here.

3 With regard to the October 20th proceedings, I
4 wrote this when I got off the bench and then I waited
5 until I got the transcript, and I think I got the
6 transcript the next day, my computer shows that I
7 actually did it right off the bench when it was fresh in
8 my mind, and I don't know what happened to it, but this
9 is the decision. And I'll E-File this without change
10 today. It's a two-page decision.

11 All right, counsel, thank you.

12 MR. FORLENZA: The only other thing --

13 THE COURT: Yes?

14 MR. FORLENZA: We will need more time. We will
15 work it out with the other side.

16 (Continued on the following page.)

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1 THE COURT: Submit a stipulation to me and I'm
2 happy to do that.

3 MR. FORLENZA: Thanks very much, your Honor.

4 THE COURT: Does anybody want any of the papers
5 that were submitted with these motions back or can I put it
6 in our discard pile?

7 MR. CONWAY: We don't need our copies back, your
8 Honor.

9 THE COURT: Okay. Happy new year everybody. I
10 forgot to say that.

11 (Whereupon, the above-captioned proceedings
12 were concluded.)

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14 (It is hereby certified that the
15 (foregoing is a true and accurate
16 (transcript of the proceedings.
17 (


16 ROBERT PORTAS, RPR, CRR
17 Senior Court Reporter
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Robert Portas, RPR, CRR